

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 97

Docket No. NY-0752-97-0332-I-1

**Arthur E. Walker,
Appellant,**

v.

**Department of Health and Human Services,
Agency.**

June 5, 2009

Arthur E. Walker, Peekskill, New York, pro se.

Fernando Morales, Esquire, New York, New York, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of a November 5, 1997 initial decision that affirmed his removal. For the reasons set forth below, we DISMISS the petition for review as untimely filed by more than twelve years with no showing of good cause for the delay.

BACKGROUND

¶2 Effective March 21, 1997, the agency removed the appellant from his Physical Science Technician position based on charges of misconduct. Initial Appeal File (IAF), Tab 10, Subtabs 4a, 4b, 4f. The appellant appealed the removal action and, after a hearing, the administrative judge affirmed the

agency's action in an initial decision dated November 5, 1997. IAF, Tabs 1, 29. The initial decision informed the parties that it would become the final decision of the Board on December 10, 1997, unless a petition for review was filed by that date. IAF, Tab 29 at 20.

¶3 On January 21, 2009, the appellant filed a petition for review. Petition for Review (PFR) File, Tab 1. He acknowledged that his petition for review was “over ten years” late, but he contended that, “[s]ince the time of [the] hearing, [he has] had time to rebuild [himself] from the mental and physical stress caused by [the agency],” and he was now “well enough” to pursue a petition for review. *Id.* at 1.

¶4 The Clerk of the Board informed the appellant that his petition for review appeared to be untimely because it should have been filed on or before December 10, 1997, and that the Board's regulations required untimely-filed petitions for review to be accompanied by a motion to accept the petition as timely filed and/or to waive the filing time limit for good cause and an affidavit or statement signed under penalty of perjury setting forth good cause for the untimely filing. PFR File, Tab 2. The Clerk enclosed a copy of the Board's “Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit” and ordered the appellant to file his motion and an affidavit or statement signed under penalty of perjury setting forth good cause for the untimely filing on or before February 20, 2009. *Id.* The appellant timely responded to the Clerk's notice. PFR File, Tab 3. The agency has untimely responded in opposition to the appellant's petition for review. PFR File, Tab 4.

ANALYSIS

¶5 A petition for review must be filed within thirty-five days after the date of issuance of the initial decision. *Williams v. Office of Personnel Management*, [109 M.S.P.R. 237](#), ¶ 7 (2008); *Stribling v. Department of Education*, [107 M.S.P.R. 166](#), ¶ 7 (2007); [5 C.F.R. § 1201.114](#)(d). The Board will waive the

filing deadline only upon a showing of good cause for the delay in filing. *Williams*, [109 M.S.P.R. 237](#), ¶ 7; *Stribling*, [107 M.S.P.R. 166](#), ¶ 7; [5 C.F.R. § 1201.114](#)(f). To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits, or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶6 The Board will find good cause for an untimely filing when a party demonstrates that he was unable to timely file his petition due to illness, or mental or physical incapacity. *Stribling*, [107 M.S.P.R. 166](#), ¶ 8. To establish that an untimely filing was the result of an illness, the party must: (1) Identify the time period during which he suffered from the illness; (2) submit medical evidence showing that he suffered from the alleged illness during that time period; and (3) explain how the illness prevented him from timely filing his petition or a request for an extension of time. *Williams*, [109 M.S.P.R. 237](#), ¶ 8; *Stribling*, [107 M.S.P.R. 166](#), ¶ 8; *Lacy v. Department of the Navy*, [78 M.S.P.R. 434](#), 437 (1998).

¶7 In his response to the Clerk's notice, the appellant submitted an affidavit in which he stated that he was unable to timely file his petition for review because he suffered from Posttraumatic Stress Disorder (PTSD) from December 4, 1996, through January 21, 2009. PFR File, Tab 3 at 1. He further asserted that his mental and psychological condition was impaired so as to "[deprive] him of the focus and concentration required to adequately prepare such a legal document."

Id. With his affidavit, the appellant submitted a December 4, 1996 medical report from a psychiatrist, Dr. Richard G. Dudley, Jr. *Id.* at 4-9. In this report, Dr. Dudley recited the appellant's various symptoms, including anxiety and sleep disturbances, and diagnosed him with PTSD as a result of alleged workplace harassment. *Id.* at 4-8. Dr. Dudley determined that the appellant was unable to return to work at that time, and he recommended a course of psychotherapy and, potentially, medication. *Id.* at 9. The appellant submitted no medical documentation covering the time period after December 4, 1996.

¶8 We find that the appellant has failed to show good cause for the untimely filing of his petition for review. Although he is pro se on review, the delay in filing in this case is lengthy, more than twelve years. *See Williams*, [109 M.S.P.R. 237](#), ¶ 9; *Stribling*, [107 M.S.P.R. 166](#), ¶ 14. Further, the medical documentation that the appellant submitted on review does not establish that the appellant continued to suffer the effects of PTSD from November 5, 1997, until the date he filed his petition for review. *See Stribling*, [107 M.S.P.R. 166](#), ¶ 10. Even if we were to assume that the appellant's condition remained as it was on December 4, 1996, when Dr. Dudley issued his report, the report does not contain information that would explain why the appellant was unable to either file a petition for review or request an extension of time for more than twelve years. *See Williams*, [109 M.S.P.R. 237](#), ¶ 10; *Stribling*, [107 M.S.P.R. 166](#), ¶ 11-14. Therefore, he has failed to establish good cause for the untimeliness of his petition for review.

¶9 Accordingly, we dismiss the petition for review as untimely filed with no good cause shown for the delay in filing. In light of our disposition of the appellant's petition for review, we need not consider whether the agency has shown good cause for the untimely filing of its response to the appellant's petition for review.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision remains the final decision of the Board concerning the merits of the appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.